IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELMER F. HANSEN, JR., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
HAROLD H. GEBERT, et al.	:	NO. 99-4048

O R D E R - M E M O R A N D U M

AND NOW, this 22nd day of March, 2000, defendants' motion to vacate plaintiffs' notice of voluntary dismissal is denied on the condition that plaintiffs will not attempt to re-litigate their 10(b) and 10b-5 claims.[1] 15 U.S.C. § 78j(b) & 17 C.F.R. § 240.10b-5. This order is without prejudice to the parties' legal positions on plaintiffs' supplemental state law claims.

On August 11, 1999, plaintiffs filed a complaint alleging securities fraud under 10(b) and 10b-5 along with supplemental state law claims. On August 27, 1999, one of the defendants, David Farrow, filed a pro se answer. On October 7, 1999, the remaining defendants filed a motion to dismiss. That same day, defendant Farrow, now represented by counsel, moved to "strike" his answer and to file a motion to dismiss. Plaintiffs opposed the motion, noting that a motion to dismiss must be filed in the first responsive pleading. Fed. R. Civ. P. 12(b). On Rule 16 conference, it was agreed that the answer would remain of

[1] It is conceded that the 10(b) and 10b-5 claims against defendants who were not parties to the prior counterclaim in Packer v. Magellan Finance Corporation, Civ. No. 98-380 (E.D. Pa.)must be dismissed with prejudice as barred by the statute of limitations. Likewise, the 10(b) and 10b-5 claims asserted by plaintiff Commonwealth Realty Advisors, Inc., which was not a party to the prior lawsuit, must be dismissed with prejudice as to all defendants by virtue of the statute of limitations defense.

record but that defendant Farrow could file a motion to dismiss nunc pro tunc, which was filed on December 3, 1999.

On January 20, 2000, at another Rule 16 conference, since jurisdiction of this court rested solely on the 10(b) and 10b-5 claims, the focus was confined to the applicable Securities Act limitations period – three years from accrual and one year from discovery. See Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson, 501 U.S. 362, 111 S. Ct. 2773, 115 L Ed.2d 321 (1991); Lorenz v. CSX Corporation et al., 1 F.3d 1406, 1417 (3d Cir. 1993). Moreover, plaintiffs' claims appeared to be time-barred on the basis of inquiry notice having occurred as a matter of law on May 30, 1997.[2] However, since it was unclear if the prior stay of the counterclaims affected the limitations period, the parties were given until February 7, 2000 to submit additional argument. See Order, January 21, 2000.

Plaintiffs thereupon filed a notice of voluntary dismissal, choosing , apparently, to pursue the remaining claims in state court. Defendants filed a motion contesting the dismissal. Fed R. Civ. P. 59(e).

A plaintiff may file a notice of voluntary dismissal without court order "at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." Fed. R. Civ. P. 41(a). Once an appropriate pleading is filed, a plaintiff may no longer dismiss the

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[2] The time period between inquiry notice (May 30, 1997) and the assertion of the counterclaim (April 24, 1998) was approximately 11 months. Thereafter, 43 days elapsed from dismissal of the counterclaims without prejudice to the date when plaintiffs' refile. Added together, these time periods exceeded the one-year limitations period. The counterclaims had been dismissed in an action pending before another judge of this court. See note 1, supra.

action as a matter of right. "[A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). In deciding whether leave is appropriate, the most important consideration is whether the opposing party will be prejudiced. See D'Alto v. Dahon California, Inc., 100 F.3d 281, 283 (2d Cir. 1996).

Here, defendant Farrow pro se filed an answer, but later, upon representation by counsel, moved to strike the answer and to file a dismissal motion. As a result, when this motion was granted, the answer, in effect, was withdrawn. However, even assuming that the answer remained a viable pleading, the sole prejudice to defendants was the loss of a potentially favorable ruling on the federal limitations issue that could have preclusive effect in another forum. However, no ruling was made on either the federal or the state limitations issues – and an adverse ruling on federal limitations may or may not have collaterally affected the state limitations questions. On this point, no proffer or any authority was submitted.

The only demonstrated prejudice to defendants of a voluntary dismissal would be further litigation of the limitations issues in the federal securities claims. Accordingly, plaintiffs are being permitted to withdraw those claims in this forum conditioned on their not attempting to sue on them again. They have agreed not to do so. On this basis, jurisdiction over the supplemental claims is relinquished.

Edmund V. Ludwig, J.